

**UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW HAMPSHIRE**

Andrew C. Higgins

v.

Civil No. 04-cv-211-PB

Warden, New Hampshire State Prison¹

REPORT AND RECOMMENDATION

Before the court is Andrew C. Higgins' petition for a writ of habeas corpus, filed pursuant to 28 U.S.C. § 2254, and supporting status reports, alleging that his good time credit was improperly revoked in violation of his right to due process of law (document nos. 3, 7-8, 10, 12-13 and 15). Having requested a stay pending resolution of his state court proceedings, he now seeks preliminary review of the petition. See Rule 4 of the Rules Governing § 2254 Proceedings ("Habeas Rules") (requiring initial review to determine whether the petition is facially valid and may be served); see also United States District Court for the District of New Hampshire Local Rules 4.3(d) (authorizing

¹As petitioner is in custody at the New Hampshire State Prison ("NHSP"), I construe the respondent to be the Warden of the NHSP. See Habeas Rule 2 (where petitioner is in custody pursuant to a state judgment, the state officer having custody of the petitioner shall be named as respondent).

the magistrate judge to preliminarily review pro se pleadings). For the reasons stated below, I recommend that the petition be dismissed.

Construed liberally, the instant petition alleges two grounds for habeas corpus relief.² First, the petition alleges that the NHSP denied Higgins due process when it revoked his good time credit after the escape charges against him were nol prossed and in the absence of a conviction or guilty plea (Ground One). Second, the petition and supporting motion allege that the NHSP further denied him due process by revoking his good time credit without affording him a preliminary hearing and by improperly altering disciplinary documents to support the revocation determination (Ground Two).

By order of March 10, 2005, I concluded that Higgins had demonstrated exhaustion of state remedies as to Ground Two of the petition but failed to demonstrate exhaustion of Ground One. He was ordered to amend his petition to demonstrate exhaustion, delete the unexhausted claim or withdraw his petition pending the complete exhaustion of state remedies. Accordingly, the federal habeas proceedings were stayed pending his exhaustion of state

²The detailed facts in this case are set forth in my order of September 30, 2004.

court remedies. Higgins was further ordered to file a status report every 90 days to inform this court of the status of his state court proceedings.

Higgins has filed several reports and supporting documents (document nos. 7-8, 10, 12-13 and 15), none of which demonstrate that he presented the federal nature of the unexhausted claim to the New Hampshire Supreme Court for review. It is apparent from a review of the record that with regard to Ground One, no claim of a violation of a federal constitutional or statutory right was presented to the New Hampshire Supreme Court for review. I conclude, therefore, that Higgins has failed to demonstrate exhaustion of Ground One. In light of the mixed claims raised by Higgins, I recommend that the petition be dismissed. See Lanigan v. Maloney, 853 F.2d 40, 42 (1st Cir. 1988) ("habeas corpus petitioner must have presented the substance of his federal constitutional claim to the state appellate courts so that the state had the first chance to correct the claimed constitutional error"); see also Picard v. Connor, 404 U.S. 270, 275 (1971) (requiring petitioner to have fairly presented the federal nature of his claims to the state courts to give them the first opportunity to remedy the claimed constitutional error).

Any objections to this report and recommendation must be filed within ten (10) days of receipt of this notice. Failure to file objections within the specified time waives the right to appeal the district court's order. See Unauthorized Practice of Law Committee v. Gordon, 979 F.2d 11, 13-14 (1st Cir. 1992); United States v. Valencia-Copete, 792 F.2d 4, 6 (1st Cir. 1986).


James R. Muirhead
United States Magistrate Judge

Date: February 8, 2006

cc: Andrew C. Higgins, *pro se*